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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

FIRST TRUST & SAVINGS BANK OF ONEIDA, TENNESSEE,
Petitioner,

vs.

PAUL J. KENT, Receiver of Chattanooga National Bank,
Respondent.

No. 270.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

J. A. FOWLER,
Counsel for Petitioner.

S. F. FOWLER,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows that this is a civil action brought in the Federal Court for the Eastern District of Tennessee, Southern Division, by the First Trust & Savings Bank of Oneida, Tennessee, petitioner herein, against Paul J. Kent, Receiver of the Chattanooga National Bank of Chattanooga, Tennessee, respondent herein, for the purpose of recovering the proceeds of a draft for $50,687.01, which draft the petitioner had delivered to the said Chattanooga bank for collection and deposit.

The cause comes to this Court after judgment of the Court of Appeals, Sixth Circuit, affirming a judgment which sustained defendant's motion to dismiss the complaint. The record presents the question of whether or not the complaint states a cause of action.

The complaint sets forth that Paul J. Kent, Receiver of the Chattanooga National Bank, Chattanooga, Tennessee, the defendant in the trial Court and respondent herein, is engaged in winding up the affairs of the said insolvent National Banking Association, and that the First Trust & Savings Bank of Oneida, Tennessee, petitioner herein, is entitled to receive from him the full amount of the proceeds of a draft in the amount of $50,687.01 forwarded by the petitioner to the First National Bank of Chattanooga on February 25, 1933. It is further alleged that:

1. On Saturday, February 25, 1933, Scott County, Tennessee, deposited a draft drawn by the Cincinnati, New Orleans & Texas Pacific Railway Company in the amount of $50,687.01 in the petitioner bank. Said draft was payable to Scott County, Tennessee, and was endorsed, "Pay to the order of First Trust & Savings Bank, Oneida, Tennessee, Roscoe Byrd, Trustee." Immediate credit was given for the deposit[1] (R. 2).

2. The petitioner endorsed the draft, "Pay to the order of the First National Bank of Chattanooga, Tennessee," and forwarded it to that bank for collection and credit

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[1] It has been finally determined in the case of **Scott County v. Kent, Receiver** (C. C. A. 6, 1938), 97 Fed. (2d) 971, that the title to this paper was transferred by Scott County to the petitioner. Petitioner was not a party to that suit. One basis for the decision was that the Trustee of Scott County performed numerous acts "in which he recognized the ownership of the Oneida bank in the draft." The petitioner gave the said Trustee two certificates of deposit, unconditional in form, representing the full amount of the proceeds of said draft; the County Trustee made no proof of claim against the Chattanooga bank; he did not demand that any part of the dividends paid by that bank be paid to the County; in fact, he did not communicate with the Chattanooga bank. 97 Fed. (2d), at page 973. Certiorari was denied by this Court, 305 U. S. 658, 59 Sup. Ct. 358, 83 L. ed. 427.

with fifteen other items aggregating $204.16, the sixteen items being mailed on Saturday, February 25, 1933, and received by the First National Bank of Chattanooga on Sunday, February 26, 1933 (R. 2).

3. The First National Bank had ceased active operation and its business had been taken over by the Chattanooga National Bank, consequently the draft was endorsed by the First National Bank, "Pay to the order of any bank or banker," and was delivered to the Chattanooga National Bank, which endorsed it in like language, and on Sunday, February 26, 1933, forwarded the draft by mail to the Central Trust Company of Cincinnati, Ohio, along with eighteen other items aggregating $570.00, making a total of $51,257.01 (R. 2-3).

4. On Monday, February 27th, the Chattanooga bank wrote petitioner as follows:

"Your Account Has Been Credited With Your Sendings as Follows:

Date	Description	Amount	Date	Description	Amount
25	RT	2.00			
25	RM	159.48			
25	RM	50,891.17			

This Bank accepts deposits and collections on the following conditions only:

(1) Items deposited on this bank which are not good at the close of the business day may be charged back to the depositor. (2) All items not drawn on this bank are taken at depositor's risk until actual final payment. (3) All items may be forwarded for collection or payment direct to the bank upon which they are drawn or where payable, or to or through collecting agents, which agents shall have the right to send same direct to the drawee bank or where payable. (4) This bank or collecting agents may receive either cash or drafts of the payee bank or other bank and will not be

liable for failure to collect drafts so received nor for losses thereon. And should either the item itself be lost or no returns be received within a reasonable time or the draft paying same be dishonored, the amount of said items may be charged back to the customer without liability upon the part of the bank—whether the item itself can be returned or not. (5) Each collecting agent is the agent of the depositor, and neither this bank nor any collecting agent shall be responsible for the defaults, neglects or omissions of any other bank or subagent, including the payee of such check or other items. (6) Delivery to the bank of items for collection or credit shall constitute acceptance of the above conditions by the depositor, in the absence of written notice to the contrary at the time'' (R. 3-4).

The above-quoted communication was received by the petitioner on February 28th. Said communication correctly stated the understanding; the petitioner understood that said draft was received by the Chattanooga bank only as the petitioner's agent for collection; that the title did not pass to the Chattanooga bank, and that the Chattanooga bank would not become liable for the item or proceeds thereof until actual final payment to the Chattanooga bank. A general custom existed by which checks and drafts transmitted to Chattanooga banks were received by such banks as agents for collection, without liability for funds collected until actual final payment to such banks; in fact, such was the rule of law which then and for many years had prevailed in the State of Tennessee (R. 4).

5. Before said draft was received by the Chattanooga bank the petitioner had on deposit in said bank about $8,000 and did not withdraw any funds thereafter. On March 2, 1933, the petitioner drew on the Chattanooga bank for $5,000, but the draft was returned unpaid without any explanation. On March 3, 1933, the petitioner wrote the bank requesting that it ship $5,000, and received

a reply that the Governor's proclamation required observance of a holiday, thereby preventing the transaction of business (R. 4-5).

6. The draft was received by the Central Trust Company of Cincinnati before 10 a. m. on Monday, February 27, and was presented before noon to the drawee, the treasurer of the Cincinnati, New Orleans & Texas Pacific Railway Company, and was paid before 2 p. m., on the same day (R. 5).

7. On the 27th the Central Trust Company of Cincinnati wrote the Chattanooga bank as follows:

"Feb. 27, 1933

The Central Trust Company
Cincinnati, Ohio

Chattnooga National Bank,
Chattanooga,
Tennessee

In receiving checks, drafts, notes and all other items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This bank will not be liable for the default, failure or negligence of any of its direct or indirect collecting agents or correspondents nor for losses in transit and each such collecting agent or correspondent shall not be liable except for its own negligence. Right is reserved and this bank or any of its correspondents may send items, directly or indirectly, at its discretion, to any bank, including the drawee or payor bank, and accept draft or credit of drawee or payor bank as conditional payment in lieu of cash; and this bank or any of its correspondents may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited. City checks will be held at depositor's risk until next day's settlement between

banks. In making deposits, the depositor assents to the foregoing conditions.

We Credit Your Account

Description	Amount
25	340.07
	664.05
	1,020.51
	51,257.01"

This letter was received by the Chattanooga bank on February 28th. It had been the agreement of the Cincinnati bank and the Chattanooga bank for years that items transmitted as this draft had been transmitted were received by the Cincinnati bank solely as agent of the owner of the check or draft transmitted (R. 5-6).

8. No notice was ever sent by the Chattanooga bank to the petitioner with reference to the collection of said draft, nor was any notice transmitted by the Cincinnati bank to the Chattanooga bank informing the latter that said draft had been paid by the drawee (R. 6).

9. On Monday, February 27th, the Chattanooga bank, in anticipation of the payment of said draft, drew a check upon the Cincinnati bank in favor of the Federal Reserve Bank for $40,027.00 for the purpose of transferring that amount to its account with said Reserve Bank. This check was presented to the Cincinnati bank on Tuesday, February 28th, and its payment was refused, because the Cincinnati Clearing House had adopted an order restricting all withdrawals from its members to 5 per cent of balances. The Governor of Tennessee issued a proclamation proclaiming: "A holiday, commencing Wednesday, March 1, 1933, and extending through Monday, March 6, 1933, and effective to all banks in Tennessee." Subsequently, this holiday was extended; and during the following week a

holiday for the banks was called by the President. Plaintiff began to observe the moratorium called by the Governor on Wednesday, March 1, 1933, and thereafter it did no banking business until the termination of said moratorium (R. 7).

10. At the close of business on Saturday, February 25, 1933, the last day before transmission of the draft in question, the Chattanooga National Bank had a balance with the Central Trust Company of $12,423.32. At the close of business on February 28th the Chattanooga National Bank had a balance with the Central Trust Company of $71,552.83. The Chattanooga bank did not open on March 2, 1933, and after some adjustments had been made by the Conservator of the Bank and the Central Trust Company, the balance held by the Central Trust Company, collected on items forwarded to it by the Chattanooga National Bank, was about $68,000.00, which included the $50,687.01 received on the draft that belonged to plaintiff; and the entire amount of said fund was transferred to the Federal Reserve Bank at the instance of the Conservator of the Chattanooga National Bank and was placed to his credit, and thereafter, upon the appointment of defendant as receiver of said bank, all of said fund came into his hands as such receiver. No part of said fund of $50,687.01 received in payment of said draft was withdrawn from the Central Trust Company by the Chattanooga National Bank, but it remained in the custody of the Central Trust Company until the said transfer to the Federal Reserve Bank was made (R. 7-8).

11. The Chattanooga National Bank was never open for business after March 1, 1933. The petitioner was informed on March 14, 1933, that a Conservator had been appointed, and thereafter, without reopening, the respondent Paul J. Kent was appointed receiver (R. 8).

12. The Chattanooga National Bank acted solely as peti-

tioner's agent throughout the transactions described, and the respondent holds the proceeds of the said draft as Trustee for the petitioner (R. 8-9).

The complaint prayed a judgment for the principal amount of said draft, less dividends paid by the receiver, plus interest thereon, and for general relief (R. 9).

MOTION TO DISMISS.

A motion to dismiss was filed upon the grounds that the complaint fails to state a claim upon which relief can be granted; that the complaint shows on its face that the relationship of debtor and creditor existed between the Chattanooga National Bank and the petitioner by reason of the unrestricted endorsement and delivery of the draft; that upon the collection of the draft by the Central Trust Company of Cincinnati and the crediting of the proceeds thereof to the account of the Chattanooga National Bank, the relationship of debtor and creditor came into existence between the petitioner and that bank, and that the case of **Roscoe Byrd, Trustee, and Scott County v. Paul J. Kent, Receiver** (C. C. A. 6, 1938), 97 Fed. (2d) 971, constitutes the law of the case and establishes that upon the collection of the draft by the Central Trust Company of Cincinnati and the crediting of the proceeds to the account of the Chattanooga National Bank the relationship of debtor and creditor came into existence.

DECISIONS OF THE LOWER COURTS.

The District Judge sustained the motion to dismiss and dismissed the cause (R. 18) upon the ground that the petitioner was a mere creditor of the Chattanooga bank and not the owner of the proceeds of the draft (R. 16-17).

The cause was duly appealed to the Sixth Circuit Court of Appeals (R. 18-24). That Court affirmed the judgment

of the District Court (R. 25). The grounds for this decision, as shown by the opinion (R. 26-34), were that the petitioner was a mere creditor of the Chattanooga bank from the time of delivery of the draft to the latter bank, and certainly became such creditor from the time the Cincinnati bank collected the proceeds and credited them to the account of the Chattanooga bank.

The petitioner filed a petition for rehearing. This petition shows that the decision of the Court of Appeals in both of its aspects is contrary to the Tennessee law and to the agreement between the petitioner and the Chattanooga bank, as evidenced by the latter's letter of acknowledgment of receipt of the draft, the letter accompanying the draft, and the custom prevailing (R. 37-45). The Court of Appeals denied the petition for rehearing (R. 69).

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the Chattanooga National Bank became the owner of the draft upon receiving it, and did not hold the same as agent for petitioner. This was error because, first, the parties expressly agreed that the Chattanooga bank receive the draft only as agent for collection; second, the rule of law in Tennessee was and is that the Chattanooga bank received the draft only as agent.

2. The Circuit Court of Appeals erred in holding that the Chattanooga National Bank became owner of the proceeds of the draft upon collection thereof by the Cincinnati bank and crediting of the same to the account of the Chattanooga National Bank, instead of holding that the proceeds became the property of petitioner upon such collection and crediting. Such action was error because the Chattanooga bank, under the Tennessee law and the agreement of the parties, continued to be a mere agent for the petitioner.

3. The Circuit Court of Appeals erred in affirming the judgment of the lower Court. Such was error because, under the law of Tennessee and the agreement of the parties, the petitioner was the owner of the proceeds of the said draft when they were paid to the respondent receiver and is entitled to full payment thereof from him.

4. The Circuit Court of Appeals erred in not reversing the judgment of the lower Court, overruling the motion to dismiss, and directing that the trial proceed on the merits, and that petitioner be awarded interest upon such recovery as may be obtained. Such was error because under the law of Tennessee and the agreement of the parties the proceeds of the said draft were held by the Chattanooga bank and the respondent as agent for the petitioner, who was and is the owner thereof.

JURISDICTION OF THIS COURT.

The United States District Court had jurisdiction of this case because it is a case for winding up the affairs of a national bank. 36 Stat. 1092, R. S., Sec. 563, par. 15, Sec. 629, pars. 10, 11; 28 U. S. C. A., Sec. 41 (16). The Supreme Court of the United States has jurisdiction under the provisions for review of cases falling within the jurisdiction of lower Courts of the United States contained in Art. III, Sec. 2, paragraphs 1 and 2, of the Constitution of the United States. The Supreme Court of the United States has uniformly accepted jurisdiction in like cases. **Dakin v. Bayly**, 290 U. S. 147; **Ticonic National Bank v. Sprague**, 303 U. S. 406.

A full copy of the opinion of the Circuit Court of Appeals in this case is contained in the record (R. 26-34), and for that reason is not set out here. It is also reported: **First Trust & Savings Bank of Oneida, Tennessee, v. Kent** (C. C. A. 6, 1941), 119 Fed. (2d) 151.

THE QUESTIONS PRESENTED.

The questions presented are as follows:

1. Whether or not, under the Tennessee law, a negotiable draft endorsed and delivered to a bank for collection and credit, no part of the credit being withdrawn, continues to be owned by the depositor so that the relation of principal and agent between the depositor and the bank of deposit is created.

2. Whether or not, under the Tennessee law, the collection of the item by a third bank and the crediting of the proceeds to the account of the bank of deposit (the forwarding bank) terminates the said principal-agent relation and creates a relationship of creditor and debtor between the depositor and the bank of deposit.

3. Whether or not, under the agreement evidenced by the communications between the petitioner and the Chattanooga National Bank, and under the averred custom that banks accepted such items as agents for collection, the petitioner continued to be the owner of the item and also the owner of the proceeds of the item after collection by the Cincinnati bank.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The writ of certiorari should be granted because:

(1) The Circuit Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in the case of **Washington Loan & Banking Company v. Fourth National Bank of Macon** (C. C. A. 5, 1930), 38 Fed. (2d) 772, and in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in **Beane v. First National Bank &**

Trust Company of Asheville, N. C. (C. C. A. 4, 1937), 92 Fed. (2d) 382.

(2) The Circuit Court of Appeals for the Sixth Circuit has decided this case in a way in conflict with the applicable local decisions.

Bank of Louisville v. Bank of Knoxville (1874), 67 Tenn. 101;
Bank v. Cummings (1890), 89 Tenn. 609;
Givan v. Bank (Tenn. Chy. App. 1898), 52 S. W. 923, 47 L. R. A. 270;
Winchester Milling Company v. Bank of Winchester (1907), 120 Tenn. 225;
Bank & Trust Company v. Bonner (1911), 1 Higg. (Tenn. Court of Civil Appeals) 443;
Implement Company v. Mercantile Bank (1913), 128 Tenn. 320;
L. & N. R. R. Co. v. Federal Reserve Bank of Atlanta (1928), 157 Tenn. 497;
Dean Tobacco Warehouse Company v. American National Bank (1938), 173 Tenn. 365, 117 S. W. (2d) 747.

(3) The Circuit Court of Appeals for the Sixth Circuit has rendered a decision in direct conflict with applicable decisions of this Court.

Commercial Bank v. Armstrong, 148 U. S. 50;
Dakin v. Bayly, 290 U. S. 143;
Federal Reserve Bank v. Malloy, 264 U. S. 160.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, Sixth Circuit, commanding the said Circuit Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case therein entitled, "First Trust & Savings Bank

of Oneida, Tennessee, v. Paul J. Kent, Receiver of Chattanooga National Bank, No. 8492," to the end that said case may be reversed and determined by this Court, as provided by statute, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the said judgment of the said Circuit Court of Appeals may be reversed. Since the mandate of the said Court of Appeals has been issued, it is prayed that that Court be directed to recall its mandate. And your petitioner will ever pray.

FIRST TRUST & SAVINGS BANK OF ONEIDA, TENNESSEE,

By J. A. FOWLER,

Counsel.

S. F. FOWLER,

Of Counsel.

BRIEF IN SUPPORT OF PETITION.

1. The opinion of the District Court is not officially reported, but appears at pages 12 to 17 of the record. The opinion of the Court of Appeals is reported in 119 Fed. (2d) 151, and appears on pages 26 to 34 of the record.

2. The jurisdiction of this Court is invoked upon the following grounds:

(a) The complaint avers the delivery of an item to the Chattanooga bank for collection and credit, the conditional crediting of the item to the account of the depositor, and the acknowledgment of receipt of such item accompanied by the stipulation that the item was taken at the depositor's risk until actual final payment, that the amount of the item might be charged back in the event no returns should be received within a reasonable time, even if the item itself could not be returned, and that the bank of deposit and other collecting agents should be agents of the depositor. The complaint further avers a collection of the item by the Cincinnati bank immediately before the closing hour of 2 P. M., on February 27, 1933, the crediting of the proceeds on that date to the account of the bank of deposit, the refusal of the collecting bank to honor a draft against the proceeds of collection on the immediately ensuing day of February 28, 1933, and shows that the fund was never available thereafter in due course of banking. Both the District Court and the Court of Appeals have held that, under those averments, the Chattanooga bank was the owner of the proceeds in the hands of the Cincinnati bank. Such decision conflicts with the following applicable decisions of the Tennessee Court, which should be controlling because the question is one of local law:

Bank of Louisville v. Bank of Knoxville (1874), 67 Tenn. 101;

Bank v. Cummings (1890), 89 Tenn. 609;
Givan v. Bank (Tenn. Chy. App. 1898), 52 S. W. 923, 47 L. R. A. 270;
Winchester Milling Company v. Bank of Winchester (1907), 120 Tenn. 225;
Bank & Trust Company v. Bonner (1911), 1 Higg. (Tenn. Court of Civil Appeals) 443;
Implement Company v. Mercantile Bank (1913), 128 Tenn. 320;
L. & N. R. R. Co. v. Federal Reserve Bank of Atlanta (1928), 157 Tenn. 497;
Dean Tobacco Warehouse Company v. American National Bank (1938), 173 Tenn. 365, 117 S. W. (2d) 747.

(b) The decision of the District Court and the Circuit Court of Appeals for the Sixth Circuit is in conflict with the decisions of two other Circuit Courts of Appeals rendered under similar facts.

Beane v. First National Bank & Trust Company of Asheville, N. C. (C. C. A. 4, 1937), 92 Fed. (2d) 382;
Washington Loan & Banking Company v. Fourth National Bank of Macon (C. C. A. 5, 1930), 38 Fed. (2d) 772.

(c) The decision of the District Court and the Circuit Court of Appeals for the Sixth Circuit is in conflict with applicable decisions of this Court.

Dakin v. Bayly, 290 U. S. 143;
Federal Reserve Bank v. Malloy, 264 U. S. 160;
Commercial Bank v. Armstrong, 148 U. S. 50.

3. It would seem desirable, in order to avoid unnecessary repetition, and in view of the fact that this brief is bound in the same cover with the petition for writ of certiorari, to refrain from again summarizing the averments of the

complaint. The summary will be found in the foregoing petition for writ of certiorari.

4. The petitioner will urge all of the questions presented by the assignment of errors contained in the foregoing petition for writ of certiorari, and specifies each and all of them as the errors that are to be urged.

ARGUMENT.

1.

AS BETWEEN THE PETITIONER AND SCOTT COUNTY THE FORMER IS THE OWNER OF RIGHTS PERTAINING TO THE DRAFT.

It was expressly held in **Scott County, Tennessee, v. Kent** (C. C. A. 6, 1938), 97 Fed. (2d) 971, that Scott County was not entitled to maintain an action for the proceeds of this same draft because the Oneida bank, petitioner in the instant case, had become the owner of Scott County's rights thereto. This decision was based upon certain holdings of law (which we think were contrary to the Tennessee law) and upon certain facts. These facts are indicated in the report of the opinion in the said cause at 97 Fed. (2d), page 973, where it is shown that Scott County, acting through its Trustee, had performed numerous acts by which it recognized that the petitioner was owner of the draft. It accepted two certificates of deposit in the amount of the draft, it made no proof of claim against the Chattanooga bank, nor did it demand that any part of the dividend paid by this bank be paid to the County. In fact, it did not communicate with the Chattanooga bank. A petition for writ of certiorari in that case was denied by this Court. **Scott County v. Kent**, 305 U. S. 658, 59 Sup. Ct. 358, 83 L. ed. 427.

The respondent has never denied that all rights which Scott County ever had are now vested in the petitioner. Thus Scott County has dropped from the situation, and the petitioner occupies the position of depositor in the Chattanooga bank.

2.

THE CHATTANOOGA BANK TOOK THE DRAFT AS AGENT AND DID NOT ACQUIRE TITLE THERETO.

(a) Tennessee Law Made the Chattanooga Bank Agent for the Petitioner.

Under the Tennessee law no distinction is made between deposits of checks and drafts for collection and deposits of them "as cash" so long as no withdrawal is made against a deposit of the latter type. In both classes of cases the making of a deposit gives rise to the relationship of principal and agent and the title remains in the depositor.

In **Milling Company v. Bank** (1907), 120 Tenn. 228, the holder deposited checks "to their credit as cash in the bank and checked out the proceeds." 120 Tenn., at page 229. It was held that the depositor was entitled to maintain an action for negligence directly against the second bank to whom the bank of deposit had forwarded the checks.[2] The Court applied to this, a transaction of deposit as cash, the rule applicable to deposits for collection, saying:

> "Under the rule designated by Mr. Morse as the Massachusetts rule, which prevails in Tennessee and several other States, each successive bank handling an item for collection is agent of the owner, and liable to him for the discharge of the duties incumbent upon collecting agents, and the several banks in the course of the chain of transmission are held responsible only for the selection of proper agents, and for their own dili-

2 The Tennessee Court more recently has held that if the depositor withdraws part or all of the amount of the item the bank of deposit becomes owner pro tanto. **Groveland Banking Company v. City National Bank**, 144 Tenn. 520; **Henderson Company v. Stout Company**, 6 Tenn. App. 692; **Flat Creek Savings Bank v. Federal Reserve Bank**, 15 Tenn. App. 527. These decisions, however, have no bearing here because the petitioner withdrew no part of the proceeds.

gence and propriety of action in respect of the collection. Bank of Louisville v. Bank of Knoxville, 8 Baxt. 101, 35 Am. Rep. 691; Bank v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618; Morse on Banks and Banking, section 214." 120 Tenn., p. 233.

In **Bank & Trust Company v. Bonner** (1911), 1 Higg. (Tenn. Court of Civil Appeals) 443, a case of deposit of a draft as cash, the Court held that the correspondent bank is the agent of the depositor.

In the case of **Barton Seed & Implement Company v. Mercantile National Bank** (1913), 128 Tenn. 320, a garnishment action was brought against the collecting bank for the purpose of appropriating the proceeds of the item in its hands to discharge a debt owed by the original depositor in the intermediate forwarding bank. The Court held that the proceeds of the item in the hands of the collecting bank were the property of the depositor and not of the forwarding bank.

In the case of **L. & N. R. R. Co. v. Federal Reserve Bank** (1928), 157 Tenn. 497, it was held, with respect to a deposit of checks "as cash," that a bank to which the bank of deposit forwards the items for collection "becomes the agent of the customer, and, if the debt be lost by the negligence of this agent so selected, the owner of the paper has a right of action directly against such agent." 157 Tenn., at page 507.

L. & N. R. R. Co. v. Federal Reserve Bank, supra, is in direct conflict with the case of **City of Douglass v. Federal Reserve Bank of Dallas**, 271 U. S. 489, 46 S. Ct. 554, 70 L. Ed. 1051, which is followed by the decision of the Court of Appeals in **Scott County, Tennessee, v. Kent**, 97 Fed. (2d) 971, at page 973. The Court of Appeals erred in thus following a so-called "Federal" rule and in failing to apply the doctrine of the case of **Erie Railroad Company v.**

Tompkins, 304 U. S. 64. This initial error has been carried on into the opinion in the instant case, which cites both **Scott County v. Kent**, supra, and **City of Douglass v. Federal Reserve Bank**, supra.

The most recent decision of the Tennessee Supreme Court is **Dean Tobacco Warehouse Company v. American National Bank** (1938), 173 Tenn. 366, 117 S. W. (2d) 746. In that case the plaintiff deposited a check in the East Tennessee National Bank of Knoxville drawn upon the American National Bank of Nashville. Immediate credit was given for the item. The deposit slip provided, however, "All items are credited subject to final payment in cash or **solvent credits**" (emphasis ours). 117 S. W. (2d), at p. 747. The check was forwarded to the drawee bank at Nashville, collected by it and the amount credited to the account of the East Tennessee National Bank. The American National Bank of Nashville was solvent, but the East Tennessee National Bank failed. It was held that the proceeds of the item had become the property of the East Tennessee National Bank upon collection and crediting to its account. The Court reasoned that, although the Tennessee Courts approve the Massachusetts rule which "makes the collecting bank the agent of the depositor," a rule of law "may be varied by contract, express or implied" (citing **Federal Reserve Bank v. Malloy**, 264 U. S. 160), and that the rule of law in Tennessee which ordinarily would have made the American National Bank the agent of the depositor had been expressly varied and modified by the agreement of the depositor and of the East Tennessee National Bank that upon a solvent credit being made to the account of the latter the relation of debtor and creditor should arise and the depositor should cease to be owner of the item or its proceeds. The Court expressly held, in clear conflict with the decision of the Court of Appeals in our instant case, that "in the cause on trial it

was the agreement of the parties that the East Tennessee National Bank should act as agent for complainant in collecting said check, and it was given authority to appoint a subagent for the purpose of collection." 117 S. W. (2d), at page 748. With respect to the designation of the bank of deposit as agent, the terms of the deposit slip in that case are similar to the terms of the deposit slip in our instant case. The similarity ceases only in respect to the provisions controlling the situation after collection of the proceeds by the collecting bank; in the Dean case collection and crediting to the account of the forwarding bank caused the forwarding bank, by the agreement, to become owner of the proceeds and debtor to the depositor, while in our instant case there was no provision with respect to "solvent credits," and a contrary intention is apparent from provisions (4) and (5) of the Chattanooga bank's letter of acknowledgment. By those provisions the Chattanooga bank clearly protected itself against loss by reason of the default or omission of a subagent bank, and particularly provided that, although the item itself could not be returned (e. g., in the event the item should be paid), the amount of the proceeds could still be charged back to the depositor if no returns should be received within a reasonable time. A reasonable time had not expired in the instant case because the banking situation became "frozen" on the day immediately following collection and crediting of the item.

The error of the Court of Appeals in its understanding of the Dean case is apparent from its statement that the deposit slip which was used in the Dean case "contained, in substance, the same conditions as found in the present letter of the Chattanooga National Bank of February 27, 1933" (R. 33).

Thus it is most humbly urged that the Circuit Court of

Appeals has not followed, but has disregarded, the doctrine of the case of **Erie Railroad Company v. Tompkins,** 304 U. S. 64.

(b) The Tennessee Rule Was Not Modified or Varied by the Agreement of the Parties, Which of Itself Would Have Made the Chattanooga Bank Agent.

The draft was forwarded "for collection and credit" (R. 2, par. 2), which would not give rise to the relation of debtor-creditor, but of agent-principal.

Washington Loan & Banking Co. v. Fourth National Bank, 38 Fed. (2d) 772, 774 (C. C. A. 5), which stood on a motion to dismiss the bill, is a case directly in point. Checks were sent by a bank to a correspondent endorsed generally, and "enclosed in a form letter as follows: 'Enclosed find for collection and credit items enumerated below. * * * Return promptly if unpaid.'" Some of the checks were forwarded by the receiving bank for collection to its correspondents. The Court held that the checks were sent for collection, and though credit was entered when the checks were received, yet the relationship of debtor and creditor between the two banks did not arise until reasonable time had expired for the fund to reach the agent bank after the collections of the checks had been made by subagents.

That the relationship of principal and agent was created by the delivery of the item for collection and credit is also the holding in the cases of **In re Jarmulousky** (C. C. A. 2, 1918), 249 Fed. 319, 322; **Bank of America v. Waydell,** 187 N. Y. 117, 118, 120; **Carson v. Federal Reserve Bank,** 235 N. Y. S. 194, 204.

The terms of the letter of acknowledgment sent by the Chattanooga bank expressly created the relationship of principal and agent.

The third section of that letter provides that items may be forwarded for collection or payment direct to the bank upon which drawn or payable "or to or through collecting agents." The fourth provides that "this bank or collecting agents" may receive cash or drafts of the payee bank or other bank and will not be liable for failure to collect drafts so received, nor for losses thereon, and that should the item itself be lost or no returns be received within a reasonable time, or the draft paying same be dishonored, the amount of the items may be charged back to the customer without liability on the part of the bank even though the item itself cannot be returned. These provisions go farther than the Florida statute, which, in **Federal Reserve Bank v. Malloy**, 264 U. S. 160, was held to convert a bank in which a check has been deposited for credit or collection into an agent of the depositor. They clearly show that the bank did not assume the responsibility of taking the check as its own.

Paragraph 5 provides that "each collecting agent is the agent of the depositor, and neither this bank nor any collecting agent shall be responsible for the defaults, neglects or omissions of any other bank or subagent, including the payee of such check or other items."

No more positive or unambiguous language could possibly be used than this to show that the Central Trust Company of Cincinnati, which collected the draft, did so as the agent of the depositor, to wit, the Oneida bank. And if the first clause could possibly be made more certain, that is accomplished by making each individual bank handling the check responsible solely to the depositor for its negligence. Now, in connection with these positive stipulations, observe the second paragraph, to wit: **"All items not drawn on this bank are taken at depositor's risk until actual final payment."** This can mean nothing else

than that the Central Trust Company, as the agent which made the collection for the Oneida bank, was responsible alone to the depositor, the Oneida bank, as long as the funds were in its hands or under its control; and its liability ceased and the liability of the Chattanooga bank began only when the fund was released from its control by transfer to another bank, and was received by or came under the actual control of the Chattanooga bank. We respectfully submit that the clear intent of these provisions cannot be rendered nugatory by any merely imaginary and strained construction that may be placed upon them, and that the condition expressed by the Chattanooga bank that the "delivery to the bank of items for collection or credit shall constitute acceptance of the above conditions by the depositor," together with the fact alleged in the complaint that the plaintiff was thoroughly familiar with these provisions and transmitted the draft to the Chattanooga bank with them in mind, knowing that it would be accepted for collection upon those conditions, constituted a contract which fixed the rights of the respective parties, and that it is just as binding under circumstances favorable to plaintiff as under circumstances favorable to the Chattanooga bank.

The communications thus passing between the depositor and the bank of deposit furthermore must be considered against the background set forth by the averments of the complaint, namely:

> "It in fact was the general custom, not only of the First National Bank of Chattanooga, but also of all banks in Chattanooga and those doing business with said banks to accept checks and drafts transmitted to them only as agents for collection; and as such agents to handle same for the real owners of the check or draft and not to become liable for the funds collected until actual final payment had been made to it,

and furthermore such was the rule of law which then, and for many years had, prevailed in the State of Tennessee." (R. 4, par. 4).

3.

PETITIONER'S OWNERSHIP OF THE DRAFT WAS TRANSFERRED TO THE PROCEEDS AFTER PAYMENT BY THE DRAWEE.

Under the conditions attached to the handling of the draft by the Chattanooga bank, as expressed in its letter of acknowledgment, that bank never bore the risk of loss of the proceeds of the draft. We submit that the fact that the petitioner was burdened with the risk of loss is a compelling indication that the petitioner was owner, and not a mere creditor of Chattanooga. We say that petitioner bore the risk of loss for the reasons shown in the following paragraphs:

First, the collection and crediting to Chattanooga's account by the Cincinnati bank did not amount to "actual final payment" to the Chattanooga bank. The ordinary import of the words "actual final" repudiates the idea that the mere entry of a credit, amounting at best only to a constructive payment, and the initial payment to Cincinnati, as contrasted with the requirement of a final or further payment to Chattanooga, would terminate the risk of loss resting upon the depositor. It has been so held, in substance, in **Federal Reserve Bank v. Malloy**, 264 U. S. 160, and **Dakin v. Bayly**, 290 U. S. 143. **Commercial National Bank v. Armstrong**, 148 U. S. 50, is also in point.

Second, on February 27, 1933, the Chattanooga National Bank drew a check for $40,027 upon the Central Trust Company of Cincinnati, payable to the Federal Reserve Bank, which would have required part payment out of the proceeds of the draft in question. On presentation of the

check on February 28, 1933, by the Federal Reserve Bank, the Central Trust Company refused payment because the Cincinnati Clearing House had restricted withdrawals of its members to 5 per cent of their balances (R. 7, par. 9). Under provision (4) of Chattanooga's letter of acknowledgment (R. 3), Chattanooga had the right to charge back, that is, the risk of loss continued to be borne by the petitioner after the Cincinnati bank dishonored the $40,027 draft. The phrase "whether the item itself can be returned or not" clearly contemplated the continuance of the risk of loss upon Oneida under the existing circumstances because the most likely reason for nonreturn of an item would be its payment by, and surrender to, the drawee—exactly what occurred here.

Third, provision (5) of the Chattanooga bank's letter of acknowledgment states that Chattanooga was acting as Oneida's agent and stipulated that Chattanooga would not be liable for the default or omission of the Cincinnati bank (R. 3-4). This provision clearly applies to the situation existing after Cincinnati collected the draft, as well as the situation before.

Fourth, there is no showing that Chattanooga was negligent so that it might be said to have assumed the risk of loss. In the absence of a showing of negligence the Chattanooga bank is not responsible to Oneida for the proceeds. **Spears v. Peoples' Bank** (1935), 168 Tenn. 397, 79 S. W. (2d) 289.

Under these circumstances the petitioner was the owner of the proceeds in Cincinnati's possession and the Chattanooga bank was merely acting under a "collection contract," as appears from the Tennessee law as stated in **Implement Company v. Bank**, 128 Tenn. 320, at pages 323-4:

"We are of the opinion that the agreement to charge

back in case the paper should be returned is a controlling consideration. It is irreconcilable with absolute ownership on the part of the bank. An agreement in advance to charge back on failure of collection imports necessarily only a limited ownership, as in case of a bailment. Under the most extreme view, the drawing of the draft in favor of the bank, under the facts stated, could amount only to an agreement for a conditional sale of the paper; that is, that the property should belong to the bank in case collection should be made, but in case it should not be made, then the paper should revert to the drawer. At least this would be but an indirect way of stating a collection contract, when considered in connection with the deposit of the face amount of the draft, and the right accorded by the bank to check on the deposit. The substance of the transaction would be a loan of credit by the bank for the face value of the paper, based on the paper as security therefor, to be paid out of the collection when made; if not made, the paper to be returned, and the indebtedness to stand in favor of the bank, to be made good otherwise by the customer."

In **Implement Company v. Bank**, supra, the Court held that the collected proceeds in the hands of the collecting bank were the property of the depositor and not of the forwarding bank, and subject to garnishment as the funds of the depositor.

We have already discussed the case of **Dean Tobacco Warehouse Company v. American National Bank**, supra, which sustains our contention that the terms of the communications between the depositor and the bank of deposit defined the relationship and governed the determination of ownership.

The holding of the Court of Appeals is therefore erroneous because it adjudged the Chattanooga bank to be the owner of the draft and of the proceeds thereof, although it bore no risk of loss.

The case of **Commercial Bank v. Armstrong**, 148 U. S. 50, was a suit of the plaintiff, Commercial Bank, to recover $17,460.32 from Armstrong, the Receiver of the Fidelity National Bank of Cincinnati, on the ground that the receiver was trustee of that sum for the plaintiff, who had forwarded items of that total to the Fidelity bank for collection. The proceeds of collections fell into two classes: First, collections of $7,209.59 had been made by subagents of the Fidelity Bank and had not been offset or remitted to the Fidelity Bank at the time of its failure, and, second, the balance of the sum collected by subagents had been credited by them to their accounts with the Fidelity and offset against obligations of the said Fidelity to said subagents. The Court held, with respect to the first class, that the plaintiff Commercial Bank was entitled as principal to receive such funds. That decision is in exact opposition to the decision of the Court of Appeals in the present case. In so holding the Supreme Court said:

> "Such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and listed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected" (148 U. S. 50, 57).

The case of **Washington Loan & Banking Company v. Fourth National Bank of Macon** (C. C. A. 5, March 7, 1930), 38 Fed. (2d) 772, is so exactly like the present case that the decision should be emphasized. The Macon bank had long been a depository of the Washington bank, just as the Chattanooga bank had long been a depository of the Oneida bank. Similarly, the Macon bank maintained an account in a Philadelphia bank, just as Chattanooga maintained an account in Cincinnati. The Court said that collections made and credits given by the Philadelphia

bank as early as November 21st, or five days before the failure of the Macon bank on November 26th, might be recovered by the Washington bank, depending upon what should be determined to be a reasonable time for the funds to become available to the Macon bank. Certainly, in the case at bar, where the draft was received on February 27, 1933, and the proceeds frozen in the Cincinnati bank at the opening of business on February 28, 1933, there can be no claim that these proceeds were ever available to the Chattanooga bank. This is demonstrated beyond argument by the fact that the Chattanooga bank's draft drawn on February 27th was dishonored by the Cincinnati bank on February 28th.

In the case of **Beane v. First National Bank & Trust Company of Asheville, N. C.** (C. C. A. 4, October 18, 1937), 92 Fed. (2d) 382, the plaintiff, a brokerage firm known as Fenner and Beane, deposited checks in the defendant, First National Bank & Trust Company, under an agreement that the depositor could not check on out-of-town deposits until such could be collected and the depositor notified of such collections. The plaintiff deposited two out-of-town checks, totaling $9,021.96, on February 28, 1933. These were sent to the Federal Reserve Bank at Charlotte, North Carolina, and by it to banks in Concord and Canton, North Carolina. The proceeds came back to the Federal Reserve Bank and were credited to the First National Bank & Trust Company's account on March 2, 1933, but the First National Bank was not advised until after banking hours on that day, at which time it was insolvent to the knowledge of its officers and never resumed its normal functions. The Court held that the proceeds of these two checks were the property of the plaintiff. It cited Commercial Bank v. Armstrong, 148 U. S. 50, with approval, saying: "It is clear from this decision that the mere collection of an item by a subagent bank does not necessarily constitute the comple-

tion of the collection between it and the owner of the item." The Court cites with approval Washington Loan & Banking Company v. Fourth National Bank of Macon, supra, saying that it was there held "under similar circumstances that the agency of a bank, entrusted with an item for collection and credit, ceases, and the relationship of general debtor to the depositor begins only when, the collection having been made by a subagent, the proceeds become available to the agent bank, and it in turn makes them available to the owner of the item, the mere collection of the funds and entry of them by the subagent to the credit of the agent being insufficient to terminate the latter's agency." The Court further said at page 386:

> "It is sufficient to point out that the entry of the credit on the books of the Federal Reserve Bank to the account of the Asheville bank did not actually afford the latter an opportunity to mingle or use the funds, because it had no knowledge that the collection had taken place until it was too late to exercise ownership over them. The cashier of the Asheville bank testified that the bank did not undertake to draw against a collection item until notified of its collection."

Certainly the Chattanooga bank had no greater opportunity than did the Asheville bank to mingle or use the funds, as it was similarly ignorant of their collection. And the unavailability of the funds is clinched by the dishonoring of Chattanooga's draft drawn on the same day the original draft was collected by Cincinnati.

4.

OPINIONS OF THE LOWER COURTS IN THIS MATTER.

The petition for rehearing filed on behalf of the petitioner in the Circuit Court of Appeals discusses in full the errors which we believe appear in the opinion of the Court

of Appeals (R. 37-45). It is there shown that the Court's conclusion, both that the Chattanooga bank became owner of the draft when it was received, and that, even if that did not occur, it became owner of the proceeds when the draft was paid to the Cincinnati bank, is in conflict with the Tennessee decisions which we have cited in this brief. The opinion appears to be an extension of the error committed in the opinion of the same Court in the case of **Scott County v. Kent**, 97 Fed. (2d) 971, wherein the Court did not apply the Tennessee law, but applied a federal rule theretofore existing. Indeed that opinion does not indicate any consideration of Tennessee cases. In the instant case the Court of Appeals was further in error in disregarding the allegations of the complaint regarding the custom prevailing during the times of the transactions and in misconstruing the case of **Dean Tobacco Warehouse Company v. American National Bank**, supra.

The District Judge apparently did not consider the Tennessee decisions. He held that "* * * the Chattanooga letter was but a statement of the matters the Chattanooga bank might rely upon as a defense in certain events" (R. 16). Even if the rule did not prevail in Tennessee that the deposit of a draft creates the relation of principal and agent, the quoted statement would be erroneous in view of the allegations of the original bill appearing on page 4 of the record. But the error is made more apparent by the rule of law in Tennessee. That rule cast the relation of principal and agent upon the Oneida bank and the Chattanooga bank; this relation was not created primarily for the benefit of either and was not one that could be "waived" by the Chattanooga bank in the event it would serve its interest to do so.

For the same reason the following statement in the opinion in **Scott County v. Kent**, supra, at page 973, appears erroneous:

> "There was no agreement that either the Oneida bank or the Chattanooga bank should receive the draft for collection only. In absence of agreement to the contrary the Oneida bank was vested with title to the paper."

In truth, it would have been necessary for the Oneida bank and the Chattanooga bank to agree affirmatively that the latter receive title to the paper in order to escape the effect of the Tennessee rule. The legal situation is exactly the contrary of that assumed by that opinion.

There is no problem of tracing the fund involved in this case. The allegations of the complaint show that the fund found its way, intact, into the hands of the respondent (R. 7-8).

For all of the foregoing reasons it is urged that the writ of certiorari be issued, and that the judgment of the Circuit Court of Appeals for the Sixth Circuit be reversed.

Respectfully submitted,

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